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Conducting an Internal Investigation For a Multinational Organization

By **Steven G. Kobre**

And **Leanne A. Bortner**

A corporate entity operating in multiple countries and regions is constantly confronted by conflicting rules in various jurisdictions. Particularly with respect to privilege and attorney work-product protections, what may be beyond the scope of discovery or even privileged in one country can be discoverable in another. While U.S. lawyers conducting internal investigations may automatically assume that certain communications are protected, they may be quite surprised to find out that those same communications are governed by sets of rules stripping them of any protections.

This fact recently was highlighted in two Southern District of New York cases that found that communications with foreign counsel for the same client may have to be produced in U.S. litigation. See *Wultz v. Bank of China,* 979 F.Supp.2d 479, 485 (SDNY 2013); *Veleron Holding v. BNP Paribas*, 12-CV-5966 CM RLE, 2014 WL 4184806 (SDNY Aug. 22, 2014) (U.S. Mag. Ct.). In order to assess what documents may have to be produced and how to protect not-yet-created investigation materials, it is important to understand the choice of law test U.S. courts apply in deciding which jurisdiction's privilege law applies. After examining the applicable law, this article provides some guidance when approaching such investigations.

The Touch Base Test

Under Rule 501 of the Federal Rules of Evidence, questions of privilege, including choice of law inquiries, are governed by common law. "Most courts apply the 'touch base' analysis in deciding choice of law issues in cases where the alleged privileged communications occurred in a foreign country or involved foreign attorneys or proceedings." See *Cadence Pharm v. Fresenius Kabi USA,* 996 F.Supp.2d 1015, 1019 (S.D. Cal. 2014); see also *Wultz*, supra at 486 ("courts in the Second Circuit have adopted the 'touch base' approach").

Under this approach, a court applies principles of comity in a traditional choice of law "contacts" analysis, applying the law of the country that has the "predominant and most direct and compelling interest" in whether the communications should remain confidential "unless that foreign law is contrary to the public policy of [the] forum." See *Veleron,* supra at *4; Compare *Aktiebolag v. Andrx Pharm.*, 208 F.R.D. 92, 102 (SDNY 2002) (because a Korean statute prohibited discovery, production in U.S. litigation would violate "principles of comity"). The jurisdiction with the predominant interest is "either the place where the allegedly privileged relationship was entered into" or "the place in which that relationship was centered at the time the communication was sent." See *Veleron,* supra at *4 (quotations and citations omitted).

Where the communications relate to legal proceedings in the United States or provide advice on U.S. law, the legal advice is typically found to have "touched base" with the United States and courts will apply U.S. privilege law. See *Gucci America v. Guess?*, 271 F.R.D. 58, 66-70 (SDNY 2010) (U.S. law applies to document located in Italy pertaining to U.S. trademark infringement litigation preparation and strategy). On the other hand, if the legal advice relates to foreign legal proceedings or the laws of the foreign sovereign, courts generally will apply foreign privilege law. See *Wultz*, supra, at 486, 489.

Wultz involved a dispute between the family of victims of a terrorist attack and a Chinese bank. The plaintiffs had alleged that the bank provided material support and resources to a terrorist organization. The plaintiffs moved to compel the defendant bank to produce documents located in China containing communications with in-house Chinese counsel, over which the bank had asserted the attorney-client privilege and the bank had refused to provide the documents on the basis of privilege.

The court used the date of a demand letter sent from plaintiffs regarding potential U.S. litigation as the demarcation between when U.S. and Chinese privilege law applied. Under this approach, U.S. privilege law applied to all documents created after the date of the demand letter and also to documents that related to the subject matter that gave rise to the lawsuit, because those documents "pertain[ed] to American law 'or the conduct of litigation in the United States.'" *Wultz*, supra at 491 (citations omitted). All other documents were governed by Chinese privilege law, which did not require them to be protected. See id.

In another cross-border case from this year, a magistrate judge in the Southern District of New York applied the touch base test to resolve a dispute over which country's privilege rules should apply. In *Veleron*, which involved a commercial dispute between a Dutch company and various Morgan Stanley entities alleging securities fraud, the defendants sought materials from Veleron that Veleron had withheld on the basis of privilege. The question was whether Russian and Dutch law should apply to communications that occurred in Russia and the Netherlands between Veleron's Russian or Dutch counsel or whether British and Canadian law should apply as many of the communications at issue related to agreements containing choice of law provisions stating that British and Canadian law applied.

The court held that Russian and Dutch privilege laws applied because the only connection the United Kingdom and Canada had with the communications at issue was that those jurisdictions were identified in the choice of law clauses of the contracts, where Russia and the Netherlands had a "strong[er] interest in the uniform application of attorney client privilege law for Russian and Dutch attorneys and for communications that occur in their respective countries." See *Veleron,* supra, at *4. The touch base analysis,

STEVEN KOBRE *is co-founder and partner of Kobre & Kim and is based in the New York office.* LEANNE BORTNER *is an associate at the firm in the Washington, D.C. office.*

therefore, "favor[ed] the application of Russian and Dutch attorney-privilege law." The court ultimately found that Veleron did not establish that the communications at issue were privileged under Russian or Dutch law. Id. at *6.

Cross-Border Investigations

Before starting the investigation, understand the local law. One of the first steps in conducting an internal investigation on behalf of a multinational company should be to examine and understand the full contours of the privilege laws of the various jurisdictions touched by the investigation. Communications in one part of a company made in a particular location could garner certain protections while other conversations in the same company could be stripped of any protections because of the location in which they were made and the subject matter at issue. It is imperative that through consultation with counsel knowledgeable of the local laws, counsel gain an understanding of the various privileges that may or may not apply.

The scope and existence of the privilege can vary wildly among jurisdictions. In some jurisdictions, outside counsel must be registered or licensed with the jurisdiction to confer any privileges, and communications with in-house counsel may not be privileged at all. See *Veleron,* supra, at *6 (Russian law does not recognize the privilege between or work product provided by 1) in-house counsel; or 2) outside counsel who are not licensed and registered). Further, in common law jurisdictions such as England, the "litigation privilege" (similar to the work-product privilege) will not protect interview memos and other documents prepared as part of an investigation unless the "dominant purpose" of the creation of the document was for a pending or contemplated adversarial litigation (as opposed to the broader "anticipation of litigation" standard in the United States). See *Rawlinson and Hunter Trustees SA, Ors v. Akers & Anr* [2014] EWCA Civ 136.

Understanding local privilege and disclosure law will help a party avoid being blindsided years into an investigation. This understanding will also save costs and allow for a more efficient document review by eliminating the need for duplicative privilege review, or possibly any review at all. If counsel has been operating under a misunderstanding of what is privileged, it could have an impact on everything from document review to the confidentiality of an investigator's interviews.

During an investigation, plan carefully to protect the privilege going forward. An attorney conducting an investigation on behalf of a multinational company should create an investigation plan that takes into account a myriad of issues that could affect privilege. Some of those include, but are not limited to, who should (1) conduct document review, (2) interview witnesses, (3) view privileged information, (4) have their emails reviewed, (5) liaise with the government, and (6) be permitted to review the results of the investigation. Other factors that might affect which jurisdiction's privilege laws apply include (1) the location of the work to be done; and (2) the purpose of the investigation, e.g., to respond to U.S. or foreign authorities, arbitration, litigation, etc. All of these factors can affect the touch base test regarding choice of law.

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As to the questions of who should conduct the investigation and which documents may be privileged, the status of the individuals performing or assisting in functions traditionally associated with counsel can have a critical impact. Indeed, companies in foreign jurisdictions increasingly rely on professionals who are not licensed attorneys (i.e., they are not admitted to a bar) and whose communications are not considered privileged in the jurisdictions, particularly in areas such as patent, tax, and corporate in-house counseling. For example, Chinese companies utilize "in-house counsel" or "enterprise legal advisors" to provide legal opinions or analyze legal documents despite the fact that these advisors are not licensed attorneys. If U.S. law were to apply to the communications of such individuals, even if acting as the "functional equivalent" of an attorney, the prevailing view is that the communications would not be cloaked in privilege. See *Wultz*, supra, at 494-95, 494 n.98 & 100 (collecting decisions denying the privilege where foreign communications were with a functional equivalent of an attorney).

Disclosure to foreign courts or governments may waive privilege. Another factor that counsel conducting multijurisdictional investigations must consider is the impact of the disclosure of privileged materials to individuals or governmental entities. As noted above, disclosure of privileged materials to individuals during an investigation who are not licensed lawyers could vitiate privilege. In addition, the privilege may be found to have been waived where materials are produced to private litigants or parties to international arbitrations, even where the local jurisdiction did not recognize the privilege in the first place.

As for production to foreign governments, U.S. courts tend to focus on whether the production of privileged materials to a governmental entity in a jurisdiction was compelled or voluntary. Where the submission is compelled, or where there was no opportunity to assert the privilege, U.S. courts will generally find that the privilege was not waived. See *In re Grand Jury Proceedings*, 219 F.3d 175, 191 (2d Cir. 2000) ("[V]oluntary (as opposed to compelled) disclosure of documents to the [Securities and Exchange Commission] waived the company's work-product privilege as to other parties."); *Westinghouse v. Republic of Philippines*, 951 F.2d 1414, 1427 n.14 (3d Cir. 1991) (finding privilege waiver in subsequent litigation where party withdrew objections to SEC subpoena production and produced documents and noting that "had [party] continued to object to the subpoena and produced the documents only after being ordered to do so, we would not consider its disclosure of those documents to be voluntary"); *Shields v. Sturm, Ruger & Co.* 864 F.2d 379, 382 (5th Cir. 1989) ("When a party is compelled to disclose privileged work product and does so only after objecting and taking other reasonable steps to protect the privilege, one court's disregard of the privileged character of the material does not waive the privilege before another court."); *Fifty-Six Hope Road Music v. UMG Recordings,* (SDNY 2010) ("Voluntary (as opposed to compelled) disclosure of documents to a third party may waive the work-product privilege"); *In re Vitamin Antitrust Litig.*, MC 99-197 (TFH), 2002 WL 35021999, at *28 (D.D.C. Jan. 23, 2002) ("compulsion avoiding waiver requires that a disclosure be made in response to a court order or subpoena or the demand of a governmental authority backed by sanctions for noncompliance, and that any available privilege or protection must be asserted").

Thus, as a general matter, when documents are ordered to be produced, the privilege should be asserted early and companies looking to protect the privileged nature of its information should consider objecting at every stage of disclosure to protect its privilege.

Summary

With cross-border investigations increasingly prevalent as companies respond to multiple regulatory agencies and face parallel civil litigation in numerous countries, attorneys conducting such investigations will be confronted with cross-border privilege issues. It is critical to assess the local privilege laws of the various jurisdictions at issue as U.S. choice of law analysis may dictate their application. Through proper advance planning and consultation with counsel with knowledge of the applicable local laws, inadvertent waivers can be avoided. Forewarned is forearmed.

KOBRE & KIM
THE GLOBAL LITIGATION BOUTIQUE

Steven G. Kobre
Partner
1 212 488 1202
steven.kobre@kobrekim.com